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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAVIS DAY,
Petitioner,

v.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

When a public school district voluntarily establishes a formal grievance procedure to provide an orderly mechanism for the processing of teacher challenges to the inequitable application of school district policy, is the school district permitted under the First and Fourteenth Amendments to retaliate against a teacher for invoking that procedure to process a grievance that does not involve a matter of public concern?

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MAVIS DAY,
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v.
SOUTH PARK INDEPENDENT SCHOOL DISTRICT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mavis Day respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 16, 1985.

OPINIONS BELOW

The district court rendered oral findings, which are printed herein as Appendix B (15a-18a). The opinion of the court of appeals is reported at 768 F.2d 696 (5th Cir. 1985), and is reprinted herein as Appendix A (1a-14a).

JURISDICTION

The court of appeals entered judgment on August 16, 1985, Appendix C (19a). No petition for rehearing was filed. This Court has jurisdiction to review the judgment by certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment I, provides in pertinent part as follows:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Petitioner, Mavis Day, was employed as a teacher in the South Park, Texas, Independent School District pursuant to successive term contracts from the 1976-77 through the 1979-80 school years. Although Day performed competently throughout the period of her employment, the School District chose not to renew her contract for the 1980-81 school year. Contending that the nonrenewal was in retaliation for her having invoked the School District's formal grievance procedure to protest a misapplication of School District policy, Day brought this action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331(a) and 1343 alleging a violation of her rights under the First and Fourteenth Amendments to the United States Constitution.

The grievance procedure in question was voluntarily established by the School District to provide an orderly mechanism for processing any "petition by a teacher or group of teachers based upon an alleged violation, misinterpretation, or inequitable application of any existing policies, rules or regulations of the school district." (3a; P. Exh. 1). The procedure is implemented by the submission of a "formal grievance in writing to [the teacher's] principal." (*Id.*) If the grievance is not resolved to the teacher's satisfaction at this level, he or she may submit "the written grievance [to] the Superintendent." (3a-4a). If the grievance remains unresolved, the procedure provides for "impartial arbitration," and the School District may accept, reject or modify the arbitrator's decision. (P. Exh. 1) If the aggrieved teacher still is dissatisfied, he or she is entitled under state law to appeal to the state Commissioner of Education, Tex. Codes Ann. (Educ.) § 11.13 (a), and the Commissioner's decision, in turn, may be appealed to the State Board of Education, *Id.*, § 11.13(b). The Office of the State Commissioner of Education and the State Board of Education are each components of the State Central Education Agency, which is the state administrative agency charged with primary responsibility for the operation of the Texas public schools, *Id.*, § 11.01.

Day's grievance involved the School District's Job Performance Evaluation Policy, which provided for regular appraisal of a teacher's performance in order to "aid the individual to grow professionally" and "improve the quality of instruction." (R. Vol. 2, 86-110; P. Exh. 2). Day was dissatisfied with the principal's application of the Policy to her. She challenged that application under the School District's grievance procedure, proceeding in complete accord with the procedure's requirements. Thus, Day began by submitting a written grievance to her principal. Receiving no response within the allotted time, she moved to the next step of the grievance procedure and filed her written grievance with the Superintendent. When the Superintendent responded that her complaint was not grievable, Day requested arbitration. The School District agreed with the Superintendent as to grievability, and on May 7, 1980, denied Day's request for arbitration.

Shortly thereafter, on May 22, 1980, the School District decided not to renew Day's contract for the next school year.[1] Alleging that this decision violated her rights under the First and Fourteenth Amendments because it was in retaliation for her having invoked the grievance procedure, Day commenced this action in the United States District Court for Eastern District of Texas.

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[1] On June 3, 1980, Day appealed the School District's refusal to arbitrate her grievance to the State Commissioner of Education. (P. Exh. 18A).

At the conclusion of Day's case, the School District moved for a directed verdict. Although the district court was "persuaded that the Plaintiff ha[d] made a *prima facie* case that a substantial reason, if not the primary cause for Plaintiff's being selected for nonrenewal was the fact that the Plaintiff complained of a rating given to Plaintiff by [her principal] and filed a grievance" (16a), and was "prepared to find for the purposes of [the School District's] motion that [Day] would have been renewed but for . . . her complaints regarding the evaluation" (17a-18a), it nonetheless granted the School District's motion. Finding that Day's complaint did not "relate to matters of public concern" (16a), the court believed that, under this Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983), the School District was constitutionally permitted to retaliate against Day for filing her grievance.

On appeal, the Court of Appeals for the Fifth Circuit affirmed. After agreeing with the district court "that Day's complaint was 'purely a private matter'" (8a), the appellate court held that:

> As a matter of law, therefore, Day's complaint about her individual teaching evaluation and the principal's explanation of it is not protected speech under the first amendment. It follows that, even if the School District's refusal to renew Day's contract was based upon her complaint, and not upon declining enrollment, and was mistaken or unreasonable, she was not entitled to first-amendment-free-speech protection.

(8a-9a) (citations omitted). The Fifth Circuit rested this holding on the authority of *Connick v. Myers*.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION CONFLICTS WITH PRINCIPLES ESTABLISHED BY DECISIONS OF THIS COURT

The First Amendment to the United States Constitution assures every citizen "freedom of speech" and "the right . . . to petition the Government for a redress of grievances." It is well settled by the decisions of this Court that these First Amendment guarantees protect the right of individuals to present their views concerning public or private matters to agencies of the state established to resolve public or private disputes. *E.g.*, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). In *California Motor Transport*, this Court made clear that a business firm, for instance, has the right under the First Amendment to "use the channels and procedures of state and federal agencies and courts," free from governmental prohibition or penalty, "to advocate [its] causes and points of view respecting resolution of [its] business and economic interests." *Id.* at 511.

Although public employees, like citizens at large, are assured the right to "speak freely and petition openly, and [they are] protected by the First Amendment from retaliation for doing so," *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979), this Court has recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563 (1968). Precisely to accommodate these special interests, this Court in *Connick v. Myers*, 461 U.S. 138 (1983), fashioned a limited exception to the established First Amendment principles that pertain to government regulation of speech in general—an exception improperly invoked in this case by the court below.

Connick involved a First Amendment claim by Myers, a public employee, who had been discharged because she repeatedly had protested a proposed job transfer to her superiors, and—during the course of the work day—had undertaken to garner support from co-workers for her efforts to oppose the transfer. In rejecting Myer's First Amendment claim, this Court examined the nature of the speech involved, the context in which the speech had taken place, and the state's interest in regulating the speech.

As here, the employee's speech had addressed principally "matters only of personal interest," as distinguished from matters of public concern. *Id.*, at 147. But unlike the present situation, Myers did not channel the complaint through a formal grievance procedure established by her employer. For this reason, her actions implicated the state's interest, as an employer, in having latitude to deal with the kind of *ad hoc* employee complaints, grumbling, and remarks that inevitably arise on a daily basis in every government workplace in the Nation. Confronted with these competing interests, this Court struck "the balance . . . for the government" in order to accommodate "the practical realities involved in the administration of a government office." *Id.*, at 154. In cases such as those before it, this Court observed, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.*, at 146. The government's legitimate interest in the orderly management of its daily affairs would be thwarted if "virtually every remark" in the workplace would "plant the seed of a constitutional case." *Id.*, at 149.

This Court did *not* hold that speech by public employees on matters of personal interest does not constitute "speech" within the meaning of the First Amendment. To the contrary, it reiterated the well-settled principle that "[t]he First Amendment does not protect speech and assembly only to the extent that it can be characterized as political," *id.*, at 147, and expressly observed that "[w]e in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction," *ibid.* Because Myers had proceeded on an *ad hoc* basis, this Court determined that the state's interest in orderly operation was implicated, and justified the subordination of her First Amendment interests in commenting upon personnel matters. To accord the state the necessary latitude to respond to *ad hoc* complaints, and to obviate the difficulty and inappropriateness of judicial second-guessing of administrative judgments in the personnel context, this Court in *Connick* presumptively struck the constitutional balance in favor of the state in the category of cases in which the state must act to deal with such complaints.[2]

The Fifth Circuit was wrong when it determined that this presumptive *Connick* balance, rather than the general principles established by this Court, control in this case. Day, the petitioner in this case, pursued a grievance through the very procedure voluntarily established by the state for the resolution of employee grievances. In such circumstances, the state's legitimate interest in orderly operations will not be served by empowering the state to punish the employee for her actions. Indeed, the state's interest in orderly operations would be *disserved* if the state retaliates against the employee for channeling her grievance through the very procedure established for that purpose. What is more, judicial review in a case such as this will not require the court to second-guess what administrative course will best promote orderly operations under the circumstances, but simply to enforce the judgment the state itself has already made and *codified* in its formal grievance procedure.

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[2] Even with respect to personnel decisions in response to *ad hoc* speech on matters of personal interest, the Court acknowledged that federal court review would be warranted in "unusual circumstances." *Connick, supra,* 461 U.S. at 147. *Cf. Rowland v. Mad River School Dist.,* —— U.S. ——, 105 S.Ct. 1373 (1985) (dissent from denial of certiorari in case involving *ad hoc,* nondisruptive speech by employee regarding her private sexual preferences).

The School District in this case was not required to establish a formal procedure to process the grievances of its employees. The School District voluntarily chose to do so, obviously because it believed that such a procedure would allow for the orderly resolution of disputes regarding terms and conditions of employment.[3] Phrased otherwise, the procedure was designed to avoid "the disruption of the office and the destruction of working relationships," *Connick, supra*, 461 U.S., at 152, that might result if employees, such as Day, were to persist in pressing their complaints in the *ad hoc* fashion that Myers did. By denying employment to Day because she resorted to the very procedure established by the School District for the orderly resolution of employee grievances, the School District subverted not only Day's First Amendment interests, but its own legitimate interest in the orderly operation of its affairs as well.[4]

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[3] Having held out this procedure to Day, the School District's action in penalizing her for utilizing it was fundamentally unfair. Cf. *United States* v. *Caceres*, 440 U.S. 741, 752-753 & n.15 (1979); *Raley* v. *Ohio*, 360 U.S. 423, 437-438 (1959); *Cox* v. *Louisiana*, 379 U.S. 559, 569-571 (1965).

[4] *Cf. Renfroe* v. *Kirkpatrick*, 722 F.2d 714 (11th Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 98 (1984). The court in *Renfroe* applied *Connick* to reject a teacher's First Amendment claim predicated on the filing of a grievance. But the plaintiff in *Renfroe* did not advance the argument we have made in text as to why *Connick* may not be applied automatically to deny First Amendment protection to the filing of a formal grievance (and the court, from all

It should be clear beyond cavil that the School District could not legitimately punish Day outright for filing an employment-related claim, "within the limits, of course, of . . . prescribed procedures" *California Motor Transport, supra,* 404 U.S. at 515, directly with the Texas Education Agency or State Board of Education. The School District is no less an agency of the state) R. Vol. 1, 13), its procedure is no less a procedure of the state (indeed, it leads ultimately to review by the State Commissioner of Education and the State Board of Education), and its interests in penalizing its employees—by denying employment [5]—for resorting to that procedure is

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appearances, did not on its own consider and reject this argument). Nor would the record in *Renfroe* necessarily support the distinction from *Connick* that we here assert. As the district court's decision in that case makes clear, *Renfroe* v. *Kirkpatrick,* 549 F. Supp. 1368, 1372 (N.D. Ala. 1982), the plaintiff did not process her grievance in strict accordance with the school board's written procedures. Rather, "[*c*]*ontrary to Board rules,* plaintiff began personally contacting Board members before the [Board] meeting" on her grievance, *ibid.* (emphasis added), which may have impinged upon the state interest given predominance by the Court's decision in *Connick,* namely, the orderly conduct of the state's affairs. In this case, Day fastidiously complied with the procedural requirements of the School District's grievance policy.

[5] See, *e.g., Perry* v. *Sindermann,* 408 U.S. 593, 597 (1972) (emphasis added):

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to valuable governmental benefit [such as employment] and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. *For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.* This would allow

no more legitimate than the interest of the state in penalizing any of its citizens for resorting to the procedures of any of its agencies. And nothing in *Connick* is to the contrary.

The Fifth Circuit misunderstood *Connick* as establishing a *per se* rule applicable to all employee complaints that do not touch upon matters of public concern, regardless of the form those complaints might take or the circumstances in which they might be made. To be sure, *Connick* recognizes that, in order to ensure the orderly operation of government offices, public agencies must have discretion to deal with the kind of *ad hoc* personnel disputes before the Court in *Connick*. To accord the state the necessary latitude, and to avoid judicial second-guessing of administrative judgments in the personnel context, this Court in *Connick* presumptively struck the constitutional balance in favor of the state in the category of cases involving *ad hoc* personnel disputes. But, as we have described, the Court's analysis in *Connick* points to a different result in the instant case. The outcome of this case must be governed by the principles established in *California Motor Transport* and other decisions of this Court not involving the special considerations which informed this Court's holding in *Connick*.

CONCLUSION

In sum, the decision below conflicts with principles established by this Court. See Supreme Court R. 17.1(C). To rectify this conflict, and to resolve uncertainties arising in *Connick's* wake as to the principles that govern cases such as this, this Court should grant the writ to review the decision below. Prompt consideration and resolution of this issue by this Court is imperative, lest the

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the government to "produce a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526. Such inference with constitutional rights is impermissible. . . .

decision below unduly inhibit speech and petitioning activities that unquestionably fall within the coverage of the First Amendment.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 84-2119

MAVIS DAY,
Plaintiff-Appellant,
v.
SOUTH PARK INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

Aug. 16, 1985

Appeal from the United States District Court
for the Eastern District of Texas

Before RUBIN, WILLIAMS, and DAVIS, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The first amendment protects freedom of speech and the right to petition the Government for a redress of grievances. An untenured school teacher asserts that these rights were violated when her contract was not renewed because she protested her principal's unfavorable evaluation of her performance. The facts support the district court's conclusion that her actions, whether viewed as speech, petitioning, or both, related only to her superior's employment decisions that affected her in a purely personal manner not to matters of political, social, or community concern. We affirm his conclusion that the teacher was, therefore, not shielded by the first amendment from the school board's decision not to renew her contract. Constitutional rights deserve solicitous protection but the Constitution does not secure every governmental employee from adverse employment action, and it does not guarantee federal relief to every state employee who is injured, even improperly, by a decision made in the course of an employment relationship.

I.

Mavis Day, an untenured English teacher at Hebert High School in the South Park Independent School District who had been employed for one and two-year periods, filed this suit under the Civil Rights Act, 42 U.S.C. § 1983, asserting that the School District violated her first and fourteenth amendment rights by refusing to renew her contract for the 1980-1981 school year after she complained about her performance evaluation and filed a grievance. Her evidence warrants these factual conclusions.

In March, 1980, the principal of Hebert High made an evaluation of Day's teaching performance for the 1979-1980 school year, as he was required to do for all teachers. In eighteen of the twenty-four skills and personality characteristics evaluated, Day received a satisfactory rating, with positive comments dispersed throughout the evaluation form. In the other six categories, which mainly concern attitude toward school policies and relations with colleagues, Day received an unsatisfactory rating. Some of the principal's comments were: a "[l]ack of control in working with peers is often evident," and "Ms. Day does not always recognize the value of group effort. Often this causes conflicts." He recommended that Day be transferred because "[t]his teacher may function better in a different environment."

Day and the principal met on March 13 for an evaluation conference, but the principal did not explain the negative aspects of Day's evaluation to her satisfaction. Four days later, Day wrote a letter to the principal detailing her dissatisfaction with the negative evaluation and asking for specific illustrations of how her attitude had been unsatisfactory, so that she might improve it. The principal did not respond to Day's request. Day then challenged the evaluation by invoking the School District's formal grievance procedure.

Statement of Policy 4020, which outlines the formal grievance procedure, defines a grievance in the following manner:

> A "grievance" is a petition by a teacher or a group of teachers based upon an alleged violation, misinterpretation, or inequitable application of any existing policies, rules, or regulations of the school district, but shall not include a petition based upon disciplinary action not directly based on policies of the Board of the District.

Policy 4020 then states that an aggrieved teacher will first discuss a problem with the appropriate principal and that, if the matter is not resolved informally, "formal procedures may then be instituted." After outlining the levels of the grievance structure, Policy 4020 states: "No reprisals of any kind shall be taken by either party or by any member of the Administration against any party in interest, any school representative, or any other participant in the grievance procedure by reason of such participation."

Day invoked Level One of the grievance procedure on March 28, 1980, by submitting her grievance in writing to the principal, and, when the principal did not respond within the time limit dictated by Policy 4020, she submitted her grievance to the superintendent. Both grievances refer to "solving problems connected with my evaluation." The superintendent responded by letter, stating that Day's complaint was not "grievable."

At trial, the superintendent testified that the School District has a policy against entertaining grievances concerning teacher evaluations because it is the principal's responsibility to evaluate his teachers and officials higher in the administration cannot make a determination of the correctness of the teacher's point of view as opposed to the principal's. The formal grievance procedure might be invoked only if the principal violated Board policy in the process, for example, by refusing to evaluate a teacher or to sign the evaluation form. This was supported by other testimony at trial, although no School District policy statement explicitly makes this distinction.

After Day received the superintendent's response, she requested arbitration, as the procedural guidelines in Policy 4020 permit. Her request was denied by the board of trustees because "dissatisfaction . . . with one's evaluation is not a grievable complaint under board policy #4020, or under any other provision of district policy."

By letter, the assistant superintendent advised Day in May that the School District had decided not to renew her contract for the 1980-1981 school year. At trial, the School District produced testimony that this decision was based on declining enrollment, a decision to eliminate one teaching position in the English Department at Hebert, and the fact that "Day was the least senior among English teachers whose contracts expired in 1980." Day adduced testimony that the contract of an English teacher who had taught at Hebert for only one year had been renewed for the school year and that the principal told this teacher not to "associate with controversial people" because "he was going to rid himself of these controversial people, and unless [she] wanted to be in the same predicament [she] should watch who [she] associated with." This English teacher testified that she understood that Day was one of these "controversial people."

Day appealed to the State Commissioner of Education challenging the School District's refusal to arbitrate her grievance, and she subsequently appealed the School District's nonrenewal decision. While the appeals were pending, the School District agreed to expunge the 1980 evaluation from its records and, with Day's consent, the State Commissioner entered an order requiring this and dismissing the appeal concerning the evaluation. After a hearing, the Commissioner rejected Day's challenge to her nonrenewal. Day appealed this decision to the State Board of Education, which found: (1) the School District's policies prohibit retaliation for an employee's exercise of grievance rights; (2) the record contains some evidence supporting the allegation that the principal's recommendation for nonrenewal was given in retaliation for Day's exercise of her grievance rights; and (3) the School District has not conducted a hearing to determine whether Day's nonrenewal resulted from a violation of School District policy. The Board of Education ordered the School District to conduct a hearing on the matter and remanded for that purpose. On remand, the School District decided that Day's claim should be "deferred for arbitration" but that such arbitration should not take place until the case *sub judice* is finally adjudicated.

At trial, Day sought to prove that the School District decided not to renew her contract in order to retaliate against her for filing a grievance and that this violated her first amendment right to petition the government for redress of grievances. After Day rested, the district court granted the School District's motion for a directed verdict. The court concluded that under *Connick v. Meyers*,[1] and *Pickering v. Board of Education*,[2] Day's speech activities did not warrant first amendment protection because they did not relate to a matter of public concern and because the "essence of the protest" did not involve the grievance procedure or School District policy. The court concluded that Day's complaint was purely a matter of a disagreement with the merits of the rating. It also found that a substantial reason for the nonrenewal of her contract was that she complained to the principal and filed a grievance and that her contract would have been renewed but for her complaint on "a purely private matter."

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[1] 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

[2] 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

The trial court further concluded that the right to redress of grievances "is so dovetailed into" the question of whether the speech is protected that it could not distinguish between them. Although the court found that the right to redress of grievances "exists for protected speech," it concluded that it was obligated by law to rule for the School District in this case. The court also saw no violation of due process in the evidence presented to that point in the case.

Only the redress of grievances issue is raised on appeal: whether a public employee's complaint to her superior about her teaching evaluation is protected by the petition clause of the first amendment. Because the district court rendered a directed verdict, we view all of the evidence "in the light and with all reasonable inferences most favorable to the party opposing the motion." [3]

II.

In order to establish a prima facie case of a violation of the first amendment free speech clause, Day must show that her conduct is constitutionally protected and that it was a substantial or motivating factor in the School District's decision not to renew her contract.[4] When a public employee invokes the first amendment as a basis for reviewing an employment decision made by the governmental employer, however, the protection it accords must be balanced against the government's interest in, and need for, efficient public administration. Thus, in *Pickering v. Board of Education,*[5] the Supreme Court held that a public school teacher cannot be discharged for making statements on a matter of legitimate public concern unless the statements are shown to have interfered with the proper performance of the teacher's daily duties or with the regular operation of the schools, or to have been falsehoods recklessly and knowingly made.[6] In such circumstances, the state's legitimate interest in the efficient operation of its schools does not outweigh the teacher's right to freedom of speech. The predicate for protecting the teacher, however, was the teacher's right, as a citizen, to speak on a matter of public concern as well as the public interest in having free and unhindered debate on matters of public importance.

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[3] *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969); *see also United States v. Vahlco Corp.*, 720 F.2d 885, 889 (5th Cir. 1983).

In *Connick v. Meyers,*[7] the Supreme Court further emphasized the importance of the requirement that the speech in question address a matter of legitimate public concern if it is to be protected by the first amendment freedom of speech clause:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the

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[4] *See Mt. Healthy City Bd. of Educ. v. Doyle,* 429 U.S. 274, 278, 97 S.Ct. 568, 576, 50 L.Ed.2d 471, 478 (1977).

[5] 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

[6] *See id.* at 572-74, 88 S.Ct. at 1736-38, 20 L.Ed.2d at 819-20.

[7] 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

> name of the First Amendment. . . . [W]hen a public employee speaks not as a citizen upon matters of public interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[8]

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the record as a whole," [9] the Court said.

The district court correctly concluded that Day's complaint was "purely a private matter." She was primarily concerned about her principal's negative evaluation of her performance and his failure to explain her evaluation to her satisfaction. This is evident from her letter of complaint to the principal, her letters written to the principal and superintendent invoking the formal grievance procedure, and her testimony at trial. She did not speak "as a citizen upon matters of public concern," [10] but only as an individual "with individual personal disputes and grievances" concerning "information [that] would be of no relevance to the public's evaluation of the performance of governmental agencies." [11]

As a matter of law, therefore, Day's complaint about her individual teaching evaluation and the principal's explanation of it is not protected speech under the first amendment.[12] It follows that, even if the School District's refusal to renew Day's contract was based upon her complaint, and not upon declining enrollment, and was mistaken or unreasonable, she was not entitled to first-amendment-free-speech protection.[13] This conclusion is in accord with the recent Eleventh Circuit decision in *Renfroe v. Kirkpatrick.*[14]

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[8] *Id.* at 146-47, 103 S.Ct. at 1689-90, 75 L.Ed.2d at 719-20.

[9] *Id.* at 147-48, 103 S.Ct. at 1690, 75 L.Ed.2d at 720.

[10] *Id.* at 147, 103 S.Ct. at 1690, 75 L.Ed.2d at 720.

[11] *Davis v. West Community Hosp.*, 755 F.2d 455, 461 (5th Cir. 1985).

[12] *See id.* at 462.

III.

Day asserts, however, that the first amendment guarantees her the separate and distinct right to petition for a redress of grievances and that this right was violated when the School District decided not to renew her contract. This assumes that, when a government employer deals with its own employees, the protection afforded by the petition clause is entirely discrete from and broader than the shield afforded by the other clauses of the first amendment, a premise that is undermined by the Supreme Court's repeated references to these clauses as being overlapping.

"The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression," the Supreme Court said in *McDonald v. Smith*,[15] only a few weeks ago. "The Petition Clause," it continued, "was inspired by the same ideals of liberty and democracy that gave us the freedom to speak, publish, and assemble. . . . These First Amendment rights are inseparable. . . ."[16]

When the Court has accorded protection to conduct under the petition clause, other first amendment rights, such as the right to assemble, to associate, or to speak freely on a matter of legitimate public concern, were implicated by the conduct in question and were principal concerns in the Court's decision that the conduct should be protected.[17] None of the Supreme Court cases cited by Day supports the proposition that her speech on a matter of personal concern, the act of an employee addressing her employment supervisors, is protected by the petition clause because she chose to clothe her address to them in a formal grievance, in the absence of any implication of the right to freely assemble or associate.

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[13] *See Connick*, 461 U.S. at 147, 103 S.Ct. at 1690, 75 L.Ed.2d at 720.

[14] 722 F.2d 714 (11th Cir. 1984).

[15] —— U.S. ——, 105 S.Ct. 2787, 85 L.Ed.2d —— (1985).

[16] *Id.* at ————, 105 S.Ct. at 2789; *see also id.* at ——, 105 S.Ct. at 2791 (Brennan, J., concurring).

Other decisions that rest in part on the right-to-petition clause involve the exercise of first amendment rights in addition to the right to petition. For example, *Professional Association of College Educators v. El Paso Community College District*[18] addressed discrimination against union members for exercising their right to associate,[19] and *McBee v. Jim Hogg County, Texas*[20] involved an employee's complaint to county authorities about the unfairness of a political patronage system of public employment, a matter of public concern that implicates political speech and association. Similarly, *Henrico Professional Firefighters Association, Local 1568 v. Board of Supervisors,*[21] in which a union representative was foreclosed from addressing a municipal body in a limited public forum while other persons were not, also involved the right to associate, assemble, and speak freely. Other lower court cases evidence a similar admixture of the right to petition and the right to speak on matters of public concern.[22]

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[17] *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-13, 102 S.Ct. 3409, 3422-27, 73 L.Ed.2d 1215, 1232-36 (1982); *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464-66, 99 S.Ct. 1826, 1827-28, 60 L.Ed.2d 360, 363 (1979); *City of Madison v. Wisconsin Employees Relations Comm'n*, 429 U.S. 167, 174-75, 97 S.Ct. 421, 426, 50 L.Ed.2d 376, 384 (1976); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11, 92 S.Ct. 609, 611-12, 30 L.Ed.2d 642, 646 (1972); *United Mine Workers, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222-23, 88 S.Ct. 353, 356-57, 19 L.Ed.2d 426, 430-31 (1967); *Adderley v. Florida*, 385 U.S. 39, 41-42, 87 S.Ct. 242, 243-44, 17 L.Ed.2d 149, 152 (1966); *Edwards v. South Carolina*, 372 U.S. 229, 235-38, 83 S.Ct. 680, 683-85, 9 L.Ed.2d 697, 701-03 (1963); *NAACP v. Button*, 371 U.S. 415, 429-30, 83 S.Ct. 328, 336, 9 L.Ed.2d 405, 415-16 (1963); *Thomas v. Collins*, 323 U.S. 516, 531-32, 65 S.Ct. 315, 323-24, 89 L.Ed. 430, 440-41 (1945).

[18] 730 F.2d 258 (5th Cir. 1984).

[19] *Id.* at 263.

[20] 730 F.2d 1009 (5th Cir. 1984) (en banc).

A few lower court cases decided before *Connick* espouse the proposition that "a petition by a federal employee to one above him in the executive hierarchy is covered by the First Amendment." [23] Aside from the shadow placed on these decisions by *Connick*, we find them distinguishable on their facts or unpersuasive in their reasoning. In *Swaaley v. United States,*[24] decided in 1967, the Court of Claims considered a letter to the Secretary of the Navy, in which an employee who was later discharged from his job in a Navy shipyard complained of favoritism, pay-offs, and wrongdoing in the granting of promotions at the shipyard.[25] That letter, like the one in *Pickering*, addressed a matter of legitimate public concern.

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[21] 649 F.2d 237 (4th Cir. 1981).

[22] *See Anderson v. Central Point School Dist. No. 6*, 554 F. Supp. 600, 606 (D.Or. 1982) (letter to Board addressing athletic policies, a matter of public concern), *aff'd*, 746 F.2d 505 (9th Cir. 1984) (distinguishing case from *Connick* and complaint on matters of personal interest); *Pilkington v. Bevilacqua*, 439 F. Supp. 465, 474-75 (D.R.I. 1977) (grievances and letters on administration's policies and conduct, a matter of public concern), *aff'd*, 590 F.2d 386 (1st Cir. 1979).

[23] *Swaaley v. United States*, 376 F.2d 857, 863, 180 Ct.Cl. 1 (1967).

[24] 376 F.2d 857 (Ct.Cl. 1967).

[25] *Id.* at 858.

In *Albright v. United States*,[26] decided in 1970, the District of Columbia Circuit held that a meeting of federal employees to complain to an official in the executive hierarchy about a work-related grievance was an exercise of the employees' first amendment right to petition. The federal superior had secretly videotaped the meeting at which the employees met with their personnel officer to complain about a policy decision affecting their whole division to reclassify and downgrade their positions. The Privacy Act prohibited the employer's unauthorized maintenance of records of an employee's exercise of his first amendment rights, and the court, therefore, was called upon to decide only whether the meeting was an *exercise* of the employees' first amendment rights, not whether there was any violation of them. Whether employees who meet to protest to their superior a division-wide policy decision that affects them adversely are protected from being discharged for doing so by the first amendment's petition clause, post-*Connick*, is a matter that we need not here decide. It is sufficient for us to note that *Albright* does not address the discharge of a government employee or the nonrenewal of his contract for the exercise of his first amendment rights. It also does not address whether a government employee who individually makes a personal complaint to his immediate superior and then files a grievance with him is wholly shielded by the right to petition, absent the protection of other first amendment rights. We, therefore, find it inapposite to the case at hand. We also find the 1980 district court decision in *Johnson v. San Jacinto Junior College*[27] unpersuasive both because it was decided before *Connick* and for the reasons given in our earlier discussion of other cases.

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[26] 631 F.2d 915 (D.C. Cir. 1980).

[27] 498 F. Supp. 555 (S.D.Tex. 1980).

Bowen v. Watkins,[28] decided by this circuit, does not deal with the issue raised here. Two police officers who were not selected to fill the position of chief of police contended that their request for a hearing before the City Council and their later filing of suit were protected by the first amendment. The trial court's ruling that the hearing request was protected was not appealed.[29] The district court had not specifically ruled on whether the plaintiffs' filing of their suit was protected, but all parties had assumed that it was.[30] Using the balancing analysis required by *Pickering*, we noted that both the City Council hearing and the filing of the suit involved the same amount of disruption of close working relationships and both involved the public interest not only in resolving the controversy but also in ensuring that the proper officers were promoted.[31] *Bowen* did not, therefore, hold that a request for a hearing on a matter of entirely private concern is protected by the petition clause or any other first amendment right.

Connick dictates sensitivity to the form and content of the employee's speech.[32] An employee's complaint to her superior on a personal matter is no more a matter of public concern when embodied in a letter to him requesting a hearing than it is when spoken to him. Like the Eleventh Circuit in *Renfroe v. Kirkpatrick*,[33] we are hesitant to elevate such an employee's complaint to the level of constitutional protection merely because she has asserted it in the form of a grievance.

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[28] 669 F.2d 979 (5th Cir. 1982).

[29] *Id.* at 982.

[30] *Id.* at 892 n. 2.

[31] *Id.*

[32] 461 U.S. at 147, 103 S.Ct. at 1690, 75 L.Ed.2d at 720.

[33] 722 F.2d 714 (11th Cir. 1984).

Day's procedural due process claim is not before us on appeal. As we have noted, the State Board of Education has ruled that the School District's policies prohibit retaliation for an employee's exercise of grievance rights and has remanded Day's case to the School District so that it may conduct a hearing on this matter. We, therefore, do not determine whether School District policy gave Day the right to file a grievance in this case or any of the related procedural matters, nor whether Day has a cause of action arising out of the no-reprisal sentence in Policy 4020.

We also find it unnecessary to consider, and intimate no opinion about, the situation that would be presented if a government employee sought assistance from a legislator or a member of the executive branch in a position to accord her relief who was not in the direct supervisory hierarchy.

For these reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

Civil Action No. B-82-501

MAVIS DAY

vs.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT

[Filed Feb. 8, 1984]

ORAL OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

* * * *

THE COURT: Please be seated. The explanation for the Jury, in any civil case our procedure either permits or requires certain motions to be filed at various stages of the proceeding. One has been filed by the Defendant at the conclusion of the Plaintiff's case that the Court is going to grant. And I think an explanation is due the Jury.

Counsel, and I want the Appellant Court to have a full understanding of the Court's reason in the Court's holding on this, and therefore I am incorporating some findings.

The Court is persuaded that the Plaintiff has made a prima facie case that a substantial reason, if not the primary cause for Plaintiff's being selected for nonrenewal was the fact that the Plaintiff complained of a rating given to Plaintiff by Mr. Bryant and filed a grievance. The Court finds that the Plaintiff was well qualified for the position that she was holding and was not renewed when a selection was made of other persons with less seniority and perhaps less qualifications, were selected in her stead. The reason that the Court has granted the Defendant's motion is, I have reviewed the Connick case and have again read Pickering and I am persuaded that the contents of the speech that was involved in this case does not relate to matters of public concern and the essence of the protest did not involve the grievance procedure and it did not involve the school policy.

It was purely a matter of a disagreement of the merits of the rating. And I make no finding or comments regarding whether the Plaintiff was justified or not justified in complaining about the rating. But I am merely observing that the protest related to the rating in itself as opposed to procedures or matters that this Court can interpret to be areas of public concern, and therefore was vital to the point that I feel it's not protected under the First Amendment.

The point that Plaintiff's Counsel has, I think extremely ably presented relating to the right to redress is so dovetailed into that question that I am unable to distinguish them. I think the right for redress or grievances does exist and it certain exists for protected speech; in fact is in fact being utilized in this case apparently successfully, at least to some extent by the Plaintiff as it relates to the merits of her claim that she was unfairly evaluated. I find no violation of due process from what we have heard in the case at this point.

I wanted to place on the record the Court's reasoning for the Court's ruling is interpreted to permit a nonrenewal or termination for the exercise of free speech that doesn't ascend to the area of being protected. That may very well be true but the Court thinks it's probably considerable merit in the Plaintiff's complaint, but that under the law as I understand it to be, I am obligated to rule for the Defendant in this case.

So with that explanation, your job is over, Ladies and Gentlemen, and it's not necessary for you then to make a decision on the facts of this case.

Counsel, have I adequately protected your record?

MR. HALL: Yes, Your Honor, you have, and the only matter of concern that I have and I'm not sure, and as I start to say it, it is not—may not be appropriate and I suppose it doesn't matter now as far as being in the presence of the Jury. The Court, and I don't know whether it's necessary for the Court to say anything about the pendant claims in this case or not.

THE COURT: I, of course, considered that that is a matter I think properly should be left to the procedures where they are being pursued.

MR. HALL: All right, sir.

THE COURT: All right, anything further, gentlemen?

MR. HUNT: Your Honor, my first question, or your answer to my first question may answer my second one, but would it be appropriate or permitted to submit proposed supplemental findings and conclusions for the Court's consideration?

THE COURT: I will consider any that you submit. I have tried to fairly and fully state the Court's findings and conclusions on the record.

MR. HUNT: Then if I might proceed to my second question, which is that under the Supreme Court cases you cited there is a third test in it, might be helpful to the Board for you to have a finding if the Court feels it should do so at this time, as to the question of whether Mrs. Day would have been offered a new contract but for the conduct which she asserted to be protected.

THE COURT: I am prepared to find for the purposes of the motion that she would have been renewed but for the fact that she complained to the principal, Mr. Bryant, on a purely private matter that was not a public, that was not of public concern and that is the reason I thought I made that clear earlier when I said that, that her complaints regarding the evaluation was a substantial factor, if not the sole factor in her nonrenewal.

MR. HUNT: That is correct. And so the Court would consider proposed supplemental findings?

THE COURT: I will consider anything you submit.

MR. HUNT: Thank you.

THE COURT: Ladies and Gentlemen, I appreciate your consideration and attention to this case. The Jury will be excused and we are in recess.

(Whereupon the hearing on this matter was concluded.)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2119

D.C. Docket No. B-82-501-CA

MAVIS DAY,
Plaintiff-Appellant,

versus

SOUTH PARK INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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Before RUBIN, WILLIAMS, and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

August 16, 1985

Issued as Mandate: Sept. 9, 1985

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-82-501

MAVIS DAY

vs.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT

[Filed Feb. 8, 1984]

JUDGMENT

Comes Now the Court, sua sponte, and vacates its earlier judgment of January 30, 1984, and in its place enters the following judgment.

On January 25, 1984, this Court granted defendant's Motion for a Directed Verdict for the reasons stated at that time. Accordingly, it is therefore

ORDERED, ADJUDGED and DECREED that Judgment be entered for the defendant and that the plaintiff shall bear all costs.

Further ORDERED that the Judgment of January, 30, 1984 is vacated.

SIGNED and ENTERED this 7th day of February, 1984.

/s/ Robert M. Parker
United States District Judge